



CITY OF NEWPORT BEACH
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July 16, 2015

The Honorable William Ruh, Chairman
California Regional Water Quality Control Board, Santa Ana Region
3737 Main Street, Suite 500
Riverside, California 92501-3348

RE: Regional Board Meeting, July 24, 2015
Agenda Item No. 14: Newport Bay Copper/Metals TMDLs

Dear Honorable Chair William Ruh and Board Members:

Over the course of many years, the City of Newport Beach ("City") has been working closely with the Santa Ana Regional Water Quality Control Board (Board) and its staff to proactively address a wide range of water quality related issues. The City has been on the forefront of water quality issues including, but not limited to, undertaking costly dredging operations; reducing sediment loading to Newport Bay; reducing contaminants and harmful bacteria; pioneering and developing means to reduce naturally occurring selenium; working collaboratively with the Board's staff to reduce other storm water pollution; and taking actions necessary to achieve and maintain water quality standards.

Water quality monitoring studies performed by Board and City show that these efforts have been effective in bringing much of the harbor into compliance with the California Toxic Rule (CTR) standard for copper and lowering copper concentrations in the remainder of the harbor to within 1-3 ppb of CTR. Based on recommendations by the California Department of Pesticide Regulation (DPR) to ban copper-based antifouling paints (AFP) with high leach rates, it is now reasonable for us all to expect that the remaining areas in the harbor will also come into compliance with CTR.

Notwithstanding this significant and costly effort undertaken by the City to improve water quality, we acknowledge that Board staff is developing a Basin Plan amendment to incorporate a revised copper Total Maximum Daily Load (TMDL) for Newport Bay. Board staff has confirmed that compliance may likely require the City to restrict or ban the use of *legally-available* copper-based AFP in Newport Harbor.

This is a well-intended concept, but has virtually no chance of actually working. Additionally, as more fully set forth in the attached document entitled "History of Copper Paint Regulation", and as we have previously advised staff, we believe that the staff's recommendation is precluded by doctrine of preemption as DPR is the exclusive regulator of pesticides, including copper-based AFPs.

We respectfully request that you reject this proposal. We say this again acknowledging the fine work of your staff, whom we respect very much.

Quite simply, we believe that the local regulation proposed by the implementation plan is both unenforceable and an end run around DPR notwithstanding the fact that the State of California, DPR, has already established standards under which copper-based AFP may be lawfully used and DPR is the exclusive authority to regulate pesticides "to the exclusion of all local regulation." (Cal. Food & Agric. Code. §11501.1.)

We suggest that the Board recognize DPR's prohibition on very high leach rate copper-based AFPs that exceed the leach rate thresholds set by DPR in 2014 in lieu of requiring our one community and harbor to be more restrictive than the DPR mandate. Complying with the DPR-established leach rates will serve the intent of any Basis Plan Amendment and, as confirmed by DPR, should dramatically reduce the use of copper in anti-fouling paints. (*Determination of Maximum Allowable Leach Rate and Mitigation Recommendations for Copper Antifouling Paints Per AB 425* ("Determination"), p.3.) In addition to respecting DPR's preemptive role, our suggested alternative provides the benefit of allowing the industry to react to the newly-established leach-rate thresholds so that the success of product reformulation can be adequately assessed.

It also allows the boating community – especially the local boating community – to more thoughtfully react to these important changes to time-tested ways of doing things.

Additionally, the City of Newport Beach strongly believes any such monitoring, enforcement, testing, etc. for compliance with DPR regulation associated with AFP's must be applied on a Statewide basis, by the State. The monitoring of vessels for compliance to State or Federal regulations should be looked at in the same way the States and Federal governments monitor and regulate land based vehicles through the control of the various products used in their assembly and upkeep (such as tires, brake pads, oils and fuel). The compliance monitoring for such items like DPR's AFP standards should be done through a required testing program prior to obtaining vessel registration, similar to the SMOG check compliance program for vehicles.

We do not believe such responsibilities should be delegated to the local or county government, nor should it be applied to one, or a few, particular harbors. We are ill-equipped to do this work. Further, a piecemeal approach to regulation creates a ready market to move vessels around to other locations for AFP. Expecting a municipality to track the ins and outs of vessels and their AFP work is unreasonable.

To summarize, the legislative scheme outlined in the attachment leaves, in our opinion, no room for local additional or supplemental legislation. Clearly, under Food and Agricultural Code Section 11501.1, the state is the exclusive regulator of use of pesticides.

As we have noted, if the City of Newport Beach prohibits or restricts the application of DPR approved copper-based paint in Newport Beach alone, someone a short distance away in Long Beach, Huntington Beach or Dana Point would not be restricted. As a store in any of these communities could sell paint banned in Newport Beach, such a pervasive conflict requires that state law predominate. Otherwise, the result will be an unnecessary confusion and uncertainty as different localities attempt to enforce different rules. A patchwork of varying restrictions on paint would be extremely costly and nearly impossible to enforce, especially in Orange County with our multiple harbors and marine paint vendors.

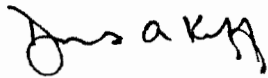
If the State of California (and any of its departments or agencies as each are considered the State in our eyes) approves the use of a particular product(s) for sale and use, in this case AFPs, that include a known and expected discharge rate of a particular substance, in this case copper, then there is an implied and expected understanding that that product is acceptable although it causes an associated exceedance of another rule, in this case CTR. If the Regional Water Quality Control Board disagrees with DPR (its sister State agency) on the use of this product, then we respectfully suggest that the onus is on the Regional Water Quality Control Board and DPR as the appropriate parties to come to a joint agreement so that California speaks with one voice, and its individual departments do not look to local government to decipher conflicting messages.

For all of these reasons, and based on the provisions of the Business and Professions Code, the Food and Agriculture Code, case law, and recent legislative action outlined in the attachment, we just don't think this is wise or will work. It is clear that DPR is the preemptive regulating and enforcement agency with regard to the use of anti-fouling paints. Requiring the City of Newport Beach to restrict the use of legally-available paint likely interferes with state law and the intent of the California Legislature. A requirement imposed in Newport Harbor would directly interfere with the power vested in DPR to regulate the use of pesticides. We respectfully suggest that you not adopt these new requirements on our

community and harbor, instead working with DPR to implement, measure and test the success of DPR's new obligations.

As always, and in recognition of our strong history of collaboration with your Board, we stand ready to assist you in that endeavor.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Kiff". The signature is stylized with a large initial "D" and a cursive "Kiff".

Dave Kiff
City Manager
City of Newport Beach

Encl.: History of Copper Paint Regulation
DPR correspondence to The Honorable Toni Atkins, February 14, 2014

Cc: Kurt V. Berchtold, Executive Director
Terri Reeder, Chief Coastal Waters Planning Section

History of Copper Paint Regulation

For over 40 years tributyltin (TBT) was used as a biocide in antifouling bottom paint and applied to the hulls of marine vessels. Although effective, TBT was found to be highly toxic to a wide range of organisms and was outlawed in the 1990s. Once TBT was banned, copper-based paints began to be used to control marine growth on boat hulls. After over two decades of use, there was concern over the impact of copper-based paints on marine life. A legislative response to this concern was introduced by California Senator Kehoe in 2011 by way of Senate Bill No. 623, which sought to prohibit the sale of marine antifouling paints that contain copper in California after January 1, 2015¹. (Sen. Bill No. 623 (2011-2012 Reg. Sess.) as introduced February 18, 2011.) As you are probably aware, this legislative effort was prompted by the determination that compliance with the TMDL Basin Plan Amendment for the Shelter Island Yacht Basin in San Diego required limiting the use of copper antifouling paint. (Sen. Bill No. 623 (2011-2012 Reg. Sess.) §1.) Notably, the SB 623 recognized that statewide action was necessary (SB 623, Section 1(e).)

At this same time, a statewide working group led by DPR was formed with the intent to assess the geographical distribution of copper pollution in California's aquatic environments. Notably, the State Water Resources Control Board was included in this effort. (Sen. Com. on Environmental Quality, Analysis of Sen. Bill. No. 623 as amended on April 25, 2011, p. 4.). As a result of this effort, DPR reevaluated copper-based antifouling paints and required registrants with copper-based AFP pesticides to provide specified information to DPR including the type of paint, leach rate and strategies to reduce dissolved copper concentrations in California marinas. (*id.* at p. 5.) The need for the effort to be led by a statewide agency, and DPR in particular, was never uncertain. Even the SWRCB "identified the need for statewide consistency in regulation" (*id.* at p. 6, emphasis added).

However, Senator Kehoe withdrew the proposed legislation in 2012 citing the pending outcome of "state and federal studies that would help address the growing problem of toxic copper pollution in California's waterways." (Assem. Com. on Environmental Safety and Toxic Materials, Analysis of Assembly Bill No. 425 as amended on April 9, 2013, p.2.) Assembly Bill No. 425 (2013-2014 Reg. Sess.) was the legislative response to the short life of SB 623, stated:

"Dissolved copper concentrations in multiple water bodies exceed the copper criterion established in the California Toxics Rule (CTR) by the United States Environmental Protection Agency

¹ The legislation was subsequently amended to prohibit the sale of new recreational boats with copper-based AFP on or after January 1, 2015, and prohibit the application of copper-based AFP after January 1, 2019. (Sen. Amend. To Sen. Bill No. 623 (2011-2012 Reg. Sess.) April 25, 2011.)

(EPA). Water bodies that exceed the CTR copper criterion are placed on EPA's 303d list and a Total Maximum Daily Load (TMDL) is developed for these water bodies. Copper pollution from copper antifouling paints is a statewide problem; therefore, statewide legislation is appropriate rather than having individual Regional Water Quality Control Boards establish their own regulations." (*id.* p.2, emphasis added.)

Again, the emphasis on the need for a statewide legislative response could not be clearer and individual regional board approaches to this issue of statewide concern run counter to this legislative mandate.

AB 425, which was approved by the Governor in 2013, required that on or before February 1, 2014, DPR had to establish an acceptable leach rate for copper-based AFP to be used on recreational vessels. The stated purpose of AB 425 was to address the protection of aquatic environments from the effects of exposure to that paint.

DPR Has Established Acceptable Leach Rates for Copper-Based AFP

As required by AB 425, on January 30, 2014, DPR issued a "*Determination of Maximum Allowable Leach Rate and Mitigation Recommendations for Copper Antifouling Paints Per AB 425*" ("Determination"), which set forth maximum allowable leach rates for California registered copper-based AFPs in order to "dramatically decrease copper loading in marinas." (Determination, p.3.) In its determination, DPR's recommended an allowable copper leach rate for antifouling paints for monthly in-water cleaning at 9.5 $\mu\text{g}/\text{cm}^2/\text{day}$ and a maximum of 13.4 $\mu\text{g}/\text{cm}^2/\text{day}$ for products that do not require in-water cleaning. (Determination, p.4-5.) This determination was reflected in a letter dated February 1, 2014 from DPR to Assemblywoman Toni Atkins. A copy of the correspondence is attached hereto for your reference.

DPR expects that as a result of its Determination, 58% of the registered copper AFPs will be reformulated, which is estimated to be about 100 products. (Determination, p.5.) At the time of the issuance of the Determination, the highest leaching product on the market had a leach rate of 29.6 $\mu\text{g}/\text{cm}^2/\text{day}$. Therefore, DPR anticipates a maximum 68% reduction in the leach rate. (Determination, p.5.). Most importantly, DPR noted the following:

"The full water quality impact of this mitigation effort may not be realized for many years due to the timeframes involved with reformulation, relabeling, registration approval and market distribution." (Determination p. 6, emphasis added.)

DPR has the Preemption Authority to Regulate Pesticides

DPR has the authority to work with product manufacturers on reformulating copper-based AFP and we support DPR's efforts to address the amount of copper in coastal marinas. We believe that these efforts are consistent and in furtherance of DPR's preemptive authority to regulate pesticides such as copper-based AFPs. Specifically, California State law requires DPR to protect the environment from harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides (Food & Agr. Code §11501.). Since antifouling boat paints are considered biocides, they are regulated by DPR. (Assem. Com. on Environmental Safety and Toxic Materials, Analysis of Assembly Bill No. 425 as amended on April 9, 2013, p.3.) Under this legislative mandate, DPR is charged with the responsibility to administer California's statewide pesticide regulatory program. Before a pesticide can be used in California, the pesticide must be registered by DPR. (2014 Legislative Summary, DPR Office of Legislation and Policy, p. 5.)

Prior to registration, DPR's scientific staff reviews each product to ensure that it meets stringent standards, as prescribed in the laws (Food and Agricultural Code) and regulations (California Code of Regulations) governing pesticides in California. Reviews of data include, but are not limited to, potential human health effects, environmental fate, and the chemical properties of the product, intended use patterns, and efficacy. (*Ibid.*)

Thus, it is well established that DPR has the primary responsibility to enforce pesticide laws and regulations in California. (Bus. & Prof. Code §§ 8616, 8616.4 and 8616.5.). The laws and regulations governing the possession, sale and use of pesticides are enforced by DPR in cooperation with the office of the county agricultural commissioner (CAC) within each county. (Cooperative Agreement between the US EPA, DPR and the California Agricultural Commissioners and Sealers Association, April 2005, p.2.).

California Food and Agricultural Code Section 11501.1 could not be more unambiguous that DPR's establishment of a statewide regulation is in lieu of the regulation by individual regions of the Board. Specifically, as to pesticide regulation, Section 11501.1 provides, in pertinent part, as follows:

(a) This division and Division 7 (commencing with Section 12501) are of statewide concern and occupy the whole field of regulation regarding the registration, sale, transportation, or use of pesticides to the exclusion of all local regulation. Except as otherwise specifically provided in this code, no ordinance or regulation of local government, including, but not limited to, an action by a local governmental agency or department, a county board of supervisors or a city council, or a local regulation adopted by the use of an initiative measure, may prohibit or in any way attempt to

regulate any matter relating to the registration, sale, transportation, or use of pesticides, and any of these ordinances, laws, or regulations are void and of no force or effect.

(b) If the director determines that an ordinance or regulation, on its face or in its application, is preempted by subdivision (a), the director shall notify the promulgating entity that it is preempted by state law. If the entity does not repeal its ordinance or regulation, the director shall maintain an action for declaratory relief to have the ordinance or regulation declared void and of no force or effect, and shall also bring an action to enjoin enforcement of the ordinance or regulation.

... (Food & Agr. Code § 11501.1, emphasis added.)

Although the legislative mandate is clear, case law also supports our opinion that any local regulation of pesticide would be in conflict with the regulatory framework set forth above and therefore preempted. (See Lancaster v. Municipal Court (1972) 6 Cal.3d 805; In re Hubbard (1964) 62 Cal.2d 119, 128; In re Iverson (1926) 199 Cal. 582, 587; Monterey Oil Co. v. City Court (1953) 120 Cal.App.2d 31, 36; Markus v. Justice's Court (1953) 117 Cal.App.2d 391, 396; 59 Ops.Cal.Atty.Gen. 461, 478 (1976).²

²; See also, Galvan v. Superior Court (1969) 70 Cal.2d 851, 859-860 "'In re Hubbard, supra, 62 Cal.2d 119, 128, established three tests to determine whether a subject has been preempted by the Legislature. '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.'"



Brian R. Leahy
Director

Edmund G. Brown Jr.
Governor

February 14, 2014

The Honorable Toni Atkins
California State Assembly
State Capitol, Rm 319
Sacramento, CA 95814

Subject: AB 425 (Atkins) Copper Antifouling Paint

Dear Assembly Member Atkins:

In order to comply with AB 425 (Atkins), the Department of Pesticide Regulation (DPR) has developed measures to address the amount of copper in California's coastal marinas and potentially affecting marine life from copper antifouling paint (AFP). As you know, copper is used in paint for boat hulls as a pesticide to protect against the accumulation of barnacles, etc. on the underwater surfaces of boats and ships. At high concentrations, copper can be toxic to aquatic life including mussels, sea urchins, marine algae, and other organisms. Copper from paint enters the water from paint leaching off of boats and as a result of in-water boat hull cleaning practices.

AB 425 required DPR to, not later than February 1, 2014, (1) set a leach rate for copper paint and (2) recommend mitigation measures. The attached memo explains in greater detail the steps DPR has taken to comply with AB 425. In summary, DPR established two maximum leach rates depending on the allowed cleaning practices on the painted boats. In addition, DPR recommended seven mitigation measures.

The leach rates will be:

- 9.5 ug/cm²/day if cleaning is allowed no more frequently than once per month and the in-water hull cleaners follow California Professional Divers Best Management Practices method using soft-pile carpet.
- 13.4 ug/cm²/day for products which claim to not require in-water cleaning.

DPR determined these leach rates using mathematical models based on sampling studies done in California salt water marinas on the quantity of copper found in the water column when boats with copper-based paint are docked in the water and cleaned in the water. By adopting these new rates, DPR believes most of California's salt water marinas will come into compliance by achieving the state protective copper standard of 3.1 parts per billion.



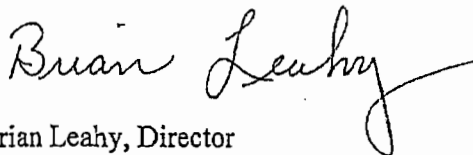
DPR is recommending the following mitigation measures:

- Product reformulation to comply with established leach rates.
- Require in-water hull cleaners to implement best management practices for in-water hull cleaning.
- Reduce in-water hull cleaning frequency to no more than once every four weeks for paints that require cleaning and eliminate cleaning for those that do not.
- Include this hull maintenance information as part of product labels.
- Develop for distribution hull maintenance brochures to be provided to boaters via boatyards at the time of painting.
- Increase boater awareness and acceptance of copper AFP alternatives.
- Foster new incentive programs and continue support for existing programs to convert copper-painted boat hulls to those painted with alternatives.
- Consider site-specific objectives for copper for certain marinas or harbors.

These measures will require everyone who has a stake in boating and the health of California marinas to work together. This includes the State Water Resources Control Board, paint manufacturers, boat owners, boatyards, divers who clean the boats, marina operators and more. Fully addressing the problem of copper pollution in California's marinas will require a change in behavior and practices.

DPR has the authority to work with product manufacturers on copper-based AFP formulation. The implementation of the rest of DPR's recommendations will necessitate the cooperation of many stakeholders. Therefore in the coming months DPR will be expanding its outreach with manufacturers, marina operators, boat owners and other stakeholders. DPR will also be working with other regulatory agencies including the United States Environmental Protection Agency and State Water Resources Control Board.

Sincerely,



Brian Leahy, Director
Department of Pesticide Regulation

cc: Mr. Gareth Elliott, Legislative Secretary, Office of the Governor
Ms. Kristin Stauffacher, Legislative Director, California Environmental Protection Agency